



February 28, 2002

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2002-0974

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159737.

The Texas Department of Criminal Justice ("TDCJ") received a request for copies of a specific EEO investigation. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. The requestor has also submitted comments to this office. *See* Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.

We begin by noting that you did not meet your burden under section 552.301 of the Government Code with respect to the first request for information. Subsections 552.301(a) and (b) provide:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
- (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

In this case, you provided us with ambiguous information regarding the date on which TDCJ received the request for information. In your correspondence to this office, you state that the TDCJ Human Resources EEO Division received the request on December 18, 2001. However, as you acknowledge, the request is date-stamped as being received at 11:29 a.m. on December 17, 2001. You state that you "are not aware that this is a TDCJ date-stamp," but that you "have no way to disclaim otherwise." The requestor indicates that he hand-delivered the request to TDCJ's Human Resources office on December 17, 2001, and that a clerk date-stamped the request in his presence. You admit that based on the date-stamp, your request for a decision would be untimely. Because of the ambiguous information provided to this office, we find that TDCJ has not adequately demonstrated that it requested a ruling from this office within the prescribed period. *See generally* Gov't Code § 552.301(e)(1)(C) (requiring governmental body to provide a signed statement as to the date the governmental body received the request). Consequently, we conclude that you failed to comply with the procedural requirements of section 552.301(a) in timely submitting a request for a decision from this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(a) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Both section 552.101 and section 552.117 can provide compelling reasons for overcoming the presumption of openness. *See* Open Records Decision No. 150 at 2 (1977).

We first address your argument under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The common-law right of privacy is incorporated into the Public Information Act by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to

the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Here, the submitted information relates, in part, to an investigation of a sexual harassment complaint. Based on our review of the submitted information, we conclude that a portion of the submitted information comprises an adequate summary of the sexual harassment investigation. *Id.* at 525-26. You must release this summary as well as the accused's statements with the identities of the complainant and witnesses redacted. We have marked the summary and the accused's statements, as well as the information within those documents that identifies the complainant and the witnesses. Information other than the marked summary and accused's statements must be withheld from disclosure under section 552.101 in conjunction with the common-law right to privacy.

With respect to the summary and the accused's statements, we note that some of the information, in addition to the identities of the complainant and the witnesses, is protected under common-law privacy. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the additional information you must withhold under section 552.101 and common-law privacy.

Finally, we address your argument under section 552.117 with respect to the information in the summary and the accused's statements. Section 552.117 provides, in relevant part:

Information is excepted from [required public disclosure] if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

...

(3) an employee of the Texas Department of Criminal Justice, regardless of whether the employee complies with Section 552.024

We have marked the information that must be withheld under section 552.117(3).

In summary, TDCJ must withhold most of the submitted information under section 552.101 of the Government Code and common-law privacy. We have marked a summary of the investigation as well as statements of the accused that generally must be released. However, TDCJ must withhold from the summary and the accused's statements the information we have marked under sections 552.101 and 552.117 of the Government Code.¹

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

¹Upon its receipt of this ruling, TDCJ must promptly release the information we have marked for release regardless of whether the investigation at issue has been completed. See Gov't Code § 552.221(a); Open Records Decision Nos. 665 (2000), 467 at 6 (1987) (governmental body may take a reasonable amount of time to produce information).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 159737

Enc: Submitted documents

c: Mr. Claude M. Williams
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(w/o enclosures)